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Nos. 13-354 & 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS *ET AL.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *ET AL.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.
Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the Third and Tenth Circuits

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BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF THE CONESTOGA WOOD SPECIALTIES *ET AL.* PETITIONERS AND THE HOBBY LOBBY *ET AL.* RESPONDENTS

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QUESTIONS PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 (ACA) compel certain employers, including Petitioners, to provide health-insurance coverage for FDA-approved contraceptives. See 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("the Mandate").

Petitioners, a family of five Mennonites and their closely-held, family-run woodworking corporation, object as a matter of conscience to facilitating contraception that may prevent the implantation of a human embryo in the womb, and therefore brought this case seeking review of the Mandate under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993.

The decision below rejected these claims, carving out an exception to the scope of religious free exercise. The court denied that either "a for-profit, secular corporation" or its family owners could claim free exercise rights. Pet. App. at 10a. In so holding, the Third Circuit expressly rejected contrary decisions of the Ninth and Tenth Circuits, and ruled at odds with prior decisions of the Second Circuit and Minnesota Supreme Court, but accorded with a recent decision of the Sixth Circuit.

The question presented is: Whether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the ACA (No. 13-356). Alternatively, the federal petitioners in No. 13-354 framed the question presented as follows: "whether

RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners."

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is an Illinois

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; the parties' written letters of consent or blanket consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel, contributed monetarily to preparing or submitting this brief.

nonprofit corporation organized in 1981. For over thirty years, Eagle Forum has defended principles of limited government and individual liberty, including freedom of religion. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.

STATEMENT OF THE CASE

This litigation pits the religious freedom of employers – both for-profit corporations and their officers and shareholders (collectively, "Plaintiffs") – to refrain from subsidizing actions that they view as sinful under deeply held religious beliefs versus the power of the Executive-Branch defendants (collectively, the "Administration") to require that Plaintiffs subsidize those actions through health insurance. Plaintiffs rely on the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA") and the First Amendment, while the Administration relies on authority purportedly conveyed by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("PPACA"). The subsidy in question concerns drugs and devices that are abortifacients according to Plaintiffs, but contraceptives according to the Administration. Under the circumstances, *amicus* Eagle Forum respectfully submits that Plaintiffs' right of conscience would trump the Administration's attempt to compel them to violate their consciences, even if the Administration had the general authority to impose its mandates (which it does not).

Constitutional Background

Under U.S. CONST. art. I, §1, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." But even Congress has its limits: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I, cl. 1.

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Two general presumptions underlie preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), where the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Article III limits federal courts' jurisdiction to cases and controversies, U.S. CONST. art. III, §2, which presents "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Standing consists of an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). With injuries directly caused by the defendant, plaintiffs can show an injury in fact with "little

question" of causation or redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Statutory Background

RFRA prohibits a government's "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §2000bb-1(a), unless both "in furtherance of a compelling governmental interest" and via "the least restrictive means." *Id.* §2000bb-1(b)(1)-(2). Congress enacted RFRA to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner*, 374 U.S. 398 (1963), in response to *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), which allowed as-applied infringement of religious freedom by facially neutral government actions. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). Congress intended the Act to safeguard the states' predominant position in regulating insurance, in the wake of this Court's holding in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that insurance can qualify as interstate commerce. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993) ("Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation").

As enacted, both PPACA's "Individual Mandate" and its "Employer Mandate" required insurance that met PPACA's "minimum essential coverage" criteria. 26 U.S.C. §§5000A(a), 4980H(a)(1); *see also* 42 U.S.C. §300gg-13 (defining "minimum essential coverage" criteria with respect to "preventive health services"). Under this Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*"), however, the "Individual Mandate" did not survive as a mandate because Congress lacks the Commerce-Clause authority to mandate that individuals purchase insurance, much less insurance of any particular type. *NFIB,* 132 Ct. at 2600. As such, as applied to those on the individual market for health insurance, the minimum-essential-coverage criteria are merely a detailed tax exemption, not a requirement for a type of insurance. It remains unresolved whether the Employer Mandate operates similarly only under the Taxing Power or instead operates under the power to regulate interstate commerce.

Regulatory Background

Acting under PPACA, defendants Departments of Health & Human Services ("HHS"), Labor, and Treasury and their respective Secretaries have purported to require that health insurance cover without charge "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" (hereinafter, the "Mandate" or "Contraceptive Mandate"). The Administration adopted this controversial requirement as an implementation of PPACA's

general directive that "health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. §300gg-13(a)(4). To implement this provision, the Administration promulgated two interim final rules, 75 Fed. Reg. 41,726 (2010); 76 Fed. Reg. 46,621 (2011), and a final rule, 77 Fed. Reg. 8725, 8725 (2012), which together adopt the Health Resources and Services Administration's *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011).

Acting by Executive fiat, the Administration recently purported to defer the Employer Mandate for 2014. It is unclear whether this deferral applies to PPACA's penalties for violating the Contraceptive Mandate, as opposed to the Employer Mandate's penalties for not providing insurance at all.

Factual Background

Plaintiffs are closely held, for-profit, corporate family businesses – Hobby Lobby, Inc., Mardel, Inc., and Conestoga Wood Specialties Corp. – and their officers and shareholders. The individual Plaintiffs have deeply held religious objections to the Contraceptive Mandate and seek to avoid subsidizing acts that they find sinful.

Although Plaintiffs' views derive from various religious faiths, the views themselves are standard religious doctrine:

> In this context, it is not possible to anaesthetize consciences, for example, concerning the effects of particles whose purpose is to prevent an embryo's implantation or to shorten a person's life.... In the moral domain, your Federation is invited to address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia.

Pope Benedict XVI, *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007); *see also* Pontifical Academy for Life, *Statement on the So-Called 'Morning-After Pill'* (Oct. 31, 2000) ("the proven 'anti-implantation' action of the *morning-after pill* is really nothing other than a chemically induced abortion [and] from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to distributing, prescribing and taking the *morning-after pill*") (emphasis in original). Although it offers its rival interpretations, the Administration does not question the sincerity of Plaintiffs' beliefs and faith.

SUMMARY OF ARGUMENT

With respect to the free exercise of religion, the Administration has no right to impose its orthodoxy on Plaintiffs, and its ham-fisted attempt to define abortion as a matter of federal law is wrong as a matter of federal law and basic reproductive science

(Section I.A). Similarly, this Court already has rejected the Administration's attempt to deny religious freedom to corporations (Section I.B). Because government action related to – and effects correlated with – the ability to get pregnant are not necessarily sex-discrimination, the Contraceptive Mandate does not qualify as a compelling government interest to remedy sex discrimination (Section I.C).

On the merits, PPACA's delegation to the Administration is impermissibly open-ended and standardless (Section II.B), which is all the more inappropriate in this area of traditional state regulation, where the Administration has purported to adopt preemptive rules notwithstanding the presumption against preempting state laws in fields of traditional state concern; the presumption against preemption allows this Court to interpret PPACA narrowly, without resort to the Administration's interpretation (Section II.C). Indeed, if this Court views the PPACA's mandate that employers provide insurance as implementing the Taxing Power – as with the Individual Mandate – rather than the Commerce Power, the Contraceptive Mandate also violates the General Welfare Clause and the Necessary and Proper Clause because federal agencies cannot make law in their view of the general welfare without congressional authorization and findings (Section II.A). Viewed without deference to the Administration and with deference instead to the states in our federalist system, PPACA's requiring "preventive care" means preventing *disease*, not preventing pregnancy (Section II.D).

In their capacity as shareholders, the individual Plaintiffs have standing to challenge government action that would control actions that the corporate Plaintiffs must take; for their part, the corporate Plaintiffs have standing to challenge arbitrary agency action to impose the Contraceptive Mandate, even without the elevated scrutiny provided by the First Amendment and RFRA (Section III.A). The Administration's attempt to defer the Employer Mandate is *ultra vires* and thus has no effect on the justiciability of this action (Section III.B).

ARGUMENT

I. THE MANDATE BURDENS RELIGION

Plaintiffs and their other supporting *amici curiae* ably brief the right to religious freedom and Plaintiffs' entitlement to relief. *See, e.g.*, Conestoga Wood Br. at 16-32. *Amicus* Eagle Forum focuses on three issues: the relevant religious views on abortifacients; the right of entities like corporations to religious freedom; and the rationality of the Administration's imposing the Contraceptive Mandate to redress sex discrimination.

A. The Government Lacks Authority to Set the Contours of Permissible Religious Thought

In statements that unintentionally demonstrate how notice-and-comment rulemaking helps ensure "informed administrative decisionmaking," *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979), the Administration has repeatedly cited 62 Fed. Reg. 8610, 8611 (1997) and 45 C.F.R. §46.202(f) to argue that federal law rejects Plaintiffs' claim that the Plan B morning-after-pill and Ella week-after-pill are

abortifacients. *See* Federal Br in No. 13-354, at 9-10 n.4. Under the Administration's cited authorities, pregnancy begins upon implantation of the embryo to the mother's uterus, not upon fertilization. The Administration's position is both irrelevant and false.

At the outset, conscience rights are defined by the rights holder, not by the Government:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Texas v. Johnson, 491 U.S. 397, 415 (1989) (*quoting West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)). Religious freedom does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Accordingly, religious freedom neither begins nor ends with government-approved religiosity. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (finding unlawful restriction of a faith with animal sacrifice as a principal form of devotion). If *courts* cannot question the merits of one's religious views in religious-freedom cases, the Administration *a fortiori* cannot impose its religious views by administrative fiat or otherwise: "[Plaintiffs] drew a line, and it is not for us to say that the line [they] drew was an unreasonable one." *Thomas*, 450 U.S. at 714.

Plaintiffs have every right not to care what the Administration considers the beginning of life.

In any event, the Administration is simply wrong about federal law. The cited regulation does indeed provide that "pregnancy encompasses the time period from implantation to delivery," 45 C.F.R. §46.202(f), but that entire regulation is confined by the limitation "as used in this subpart" (*i.e.*, 45 C.F.R. pt. 46, subpt. B), which is simply inapposite to PPACA. *See* 45 C.F.R. §46.202. More importantly, in that regulation, HHS's predecessor did not reject a fertilization-based definition for all purposes, but rather adopted the implantation-based definition only "to provide an administerable policy" for the specific purpose of obtaining informed consent for participation in federally funded research:

> It was suggested that pregnancy should be defined (i) conceptually to begin at the time of fertilization of the ovum, and (ii) operationally by actual test unless the women has been surgically rendered incapable of pregnancy.
>
> While the Department has no argument with the conceptual definition as proposed above, it sees no way of basing regulations on the concept. Rather in order to provide an administerable policy, the definition must be based on existing medical technology which permits confirmation of pregnancy.

39 Fed. Reg. 30,648, 30,651 (1974). Thus, HHS's predecessor had "no argument" on the merits against recognizing pregnancy at fertilization, but declined for administrative ease and then-current technology.

The resulting "administerable policy" merely sets a federal floor for obtaining the informed consent of human subjects in federally funded research.

A decision to set an arguable floor (based on 1970s technology) for a limited purpose for administrative expedience obviously cannot translate to the conscience context, where the question is whether individuals or institutions want to avoid participating in activities against their religious beliefs or moral convictions. Indeed, the same statute that required the regulations also enacted the Church Amendment, 42 U.S.C. §300a-7, to provide conscience-protection rights. *Compare* National Research Service Award Act of 1974, Pub. L. No. 93-348, §214, 88 Stat. 342, 353 (1974) (Church Amendment) *with id.* at §§202, 205, 88 Stat. at 349-51 (informed consent in federally funded research). Significantly, the enacting Congress expressly rejected the Administration's position here by providing that the regulatory definitions would not trump an institution's religious beliefs or moral convictions:

> It is the intent of the Committee that guidelines and regulations established by ... the Secretary ... under the provisions of the Act do not supersede or violate the moral or ethical code adopted by the governing officials of an institution in conformity with the religious beliefs or moral convictions of the institution's sponsoring group.

S. Rep. No. 93-381 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3655. Thus, federal law most

emphatically does not define life and abortion as the Administration argues.

Indeed, quite the contrary, federal law uses a fertilization-based definition at other times: "Child means an individual under the age of 19 including the period from conception to birth." 42 C.F.R. §457.10; *see also* 67 Fed. Reg. 61,956, 61,963-64 (2002) (finding it unnecessary to define "conception" as "fertilization" because HHS did "not generally believe there is any confusion about the term 'conception'"). Indeed, the fertilization-based definition has a stronger historical, legal, and scientific foundation:

> All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion.

U.S. Dep't of Health, Education & Welfare, Public Health Service Leaflet No. 1066, 27 (1963). Scientifically, the pre-implantation communications or "cross talk" between the mother and the pre-implantation embryo establish life before implantation,[2] as recognized by embryology texts.

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[2] *See, e.g.*, Eytan R. Barnea, Young J. Choi & Paul C. Leavis, "*Embryo-Maternal Signaling Prior to Implantation*," 4 EARLY PREGNANCY: BIOLOGY & MEDICINE, 166-75 (July 2000) ("embryo derived signaling ... takes place prior to implantation"); B.C. Paria, J. Reese, S.K. Das, & S.K. Dey, "*Deciphering the cross-talk of implantation: advances and challenges*," SCIENCE 2185, 2186 (June 21, 2002); R. Michael Roberts, Sancai Xie &

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See, e.g., Keith L. Moore & T.V.N. Persaud, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 15 (8th ed. 2008) ("Human development begins at fertilization when a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual."). This Court should have no difficulty in rejecting the Administration's ahistorical and unscientific legerdemain. This Nation was founded on principles of freedom of religion, not government-defined orthodoxy.

B. Corporations Can Assert Claims of Religious Freedom

The Administration's argument that corporations cannot assert free-exercise claims is plainly misplaced. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations"). "That [plaintiff] is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057 (9th Cir. 2002) (quoting *Advocates for the Arts v. Thomson*, 532 F.2d 792, 794 (1st Cir. 1976), alteration in *RK Ventures*); *cf. First Nat'l Bank of*

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Nagappan Mathialagan, "*Maternal Recognition of Pregnancy*," 54 BIOLOGY OF REPRODUCTION, 294-302 (1996).

Boston v. Bellotti, 435 U.S. 765, 780 n.15 (1978) ("settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment"). "The fundamental concept of liberty embodied in th[e Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment[, which] declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Nothing *per se* prohibits corporations from asserting religious freedom.

If anything, RFRA *extends* the ability of a corporation and its owners to assert religious-freedom rights. RFRA adopts 42 U.S.C. §2000cc-5 as its definition of the "exercise of religion," 42 U.S.C. §2000bb-2, and that definition extends to "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. §2000cc-5(7)(A) (emphasis added), and even includes the use of real property. 42 U.S.C. §2000cc-5(7)(B). While the corporate Plaintiffs are not real property, they are nonetheless a form of property that the individual Plaintiffs use in the exercise of their respective faiths. Because the RFRA definition extends broadly to *any* exercise of religion,[3] it plainly would be broad enough to include the individual

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[3] "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) (*quoting* Webster's Third New International Dictionary 97 (1976)).

Plaintiffs' use of the corporate Plaintiffs to live their lives according to their faith.[4]

C. The Mandate Does Not Redress Sex Discrimination

In the litigation over the Contraceptive Mandate in the lower courts, the Administration and its *amici* repeatedly have argued that the Contraceptive Mandate redresses sex discrimination, *see* Federal Br in No. 13-354, at 49-50, thereby providing a compelling interest that could trump religious freedom. To the contrary, discrimination because of pregnancy or the ability to get pregnant qualifies as sex discrimination only in the employment context, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983), and only there because the Pregnancy Discrimination Act expressly said so. *Id.*

Outside of that context, disparate treatment of a potentially pregnant person because of sex-neutral criteria (*e.g.*, opposition to abortion) is not discrimination *because of that person's sex. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993). "While it is true ... that only women

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[4] As indicated in Section III.A, *infra*, the entire divide between the individual Plaintiffs' roles as individuals and the corporate Plaintiffs' roles as corporations is overstated, given that the individuals' status as shareholders gives them standing to ensure that the corporations operate ethically. Although the Administration likely has its own definition of ethics, that is irrelevant because standing is measured by and under *the plaintiffs'* merits views. *Warth*, 422 U.S. at 500; *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003).

can become pregnant, it does not follow that every ... classification concerning pregnancy is a sex-based classification." *Id.* (interior quotations omitted); *Harris v. McRae,* 448 U.S. 297, 322 (1980). Instead, discrimination requires that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part *because of,* not merely *in spite of,* its adverse effects upon an identifiable group." *Bray,* 506 U.S. at 271-72 (interior quotations omitted, emphasis added); *In re Union Pacific R.R. Employment Practices Litig.,* 479 F.3d 936, 944-45 (8th Cir. 2007) (no sex discrimination if health plans deny contraceptive coverage to both women and men). Because it seeks to solve a non-existent problem, the Contraceptive Mandate is arbitrary and capricious – not compelling – as a government interest.

II. THE MANDATE IS *ULTRA VIRES* BOTH PPACA AND THE CONSTITUTION

With the foregoing background, *amicus* Eagle Forum now demonstrates that the Contraceptive Mandate exceeds HHS's authority under PPACA.

A. If Supported by the Congressional Power to Tax, the Mandate Violates the Necessary and Proper and General Welfare Clauses

Before *NFIB,* Congress intended PPACA's "minimum essential coverage" requirements to fall under the Commerce Clause. At least as applied to those in the individual market, however, *NFIB* makes the "minimum essential coverage" provisions merely conditions attached to a rather elaborate tax exemption, which therefore are subject to the

General Welfare Clause and the Necessary and Proper Clause. PPACA thus returns here with §5000A's wing clipped. It remains unclear whether the wound is mortal and whether it extends to the second wing (the Employer Mandate).

Clearly persons in the individual market who object to the Contraceptive Mandate could challenge it under the General Welfare Clause and the Necessary and Proper Clause as improper conditions under the Taxing Power. And there are good arguments for treating §4980H's Employer Mandate the same as §5000A's Individual Mandate, given that they are parallel provisions of the same statute and – with respect to PPACA's "minimum essential coverage" provisions – also reference the same statutory criteria. *See, e.g., Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("identical words used in different parts of the same act are intended to have the same meaning") (interior quotations omitted); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 88-89 (4th Cir. 2013) (treating the Individual and Employer Mandates alike). This Court therefore should require the Contraceptive Mandate to meet the criteria under the General Welfare Clause and the Necessary and Proper Clause.[5]

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[5] Indeed, even laws adopted under the Commerce Clause will violate the Necessary and Proper Clause when they affront the states' sovereignty: "it is not a Law ... proper for carrying into Execution the Commerce Clause, and is thus ... merely [an] act of usurpation [that] deserves to be treated as such."

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When *Congress* enacts legislation for the General Welfare, it is "irrelevant" "[w]hether the chosen means appear 'bad,' 'unwise,' or 'unworkable'" to this Court. *Buckley v. Valeo*, 424 U.S. 1, 91 (1976). Under Article I, it is "irrelevant" because "Congress has concluded that the means are 'necessary and proper' to promote the general welfare." *Id.* But Congress made no such finding here. All that Congress did was to require "preventive care and screening," which in no way suggests abortifacients or contraceptives.[6]

This Court has never held that an administrative agency has the constitutional power to make findings under the General Welfare Clause: "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). Particularly in concert with the non-delegation doctrine (Section II.B, *infra*) and the presumption against preemption (Section II.C, *infra*), this Court cannot allow the Administration to invent new and unfamiliar laws out of whole cloth, without a finding (or express enactment) *by Congress*.

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Printz v. U.S., 521 U.S. 898, 923-24 (1997) (interior quotations omitted, first and third alterations in original).

[6] To be clear contraceptive drugs and devices can be prescribed for medically indicated purposes, which are distinct from their role merely as contraceptives. Medically indicated uses may indeed qualify as "preventive care" for some patients.

B. The Mandate Violates the Non-Delegation Doctrine

The non-delegation doctrine derives from Article I, section 1's vesting all legislative power in the Congress. U.S. CONST. art. I, §1. Under this doctrine, Congress cannot abdicate or transfer to others the essential legislative functions with which it is thus vested. Congress can, however, delegate legislative authority, so long as it provides "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *U.S. v. Mistretta,* 488 U.S. 361, 372 (1989). To be sure, broad delegations have passed muster under the non-delegation doctrine, including the defining of "excessive profits," "unfair or inequitable distribution of voting power among security holders," "fair and equitable" commodity pricing, "just and reasonable rates," and "regulat[ing] broadcast licensing as public interest, convenience, or necessity require." *Id.* at 373-74 (interior quotations omitted). But our Constitution does not allow administrative agencies to enact regulations with the force of law contrary not only to numerous congressional enactments – *e.g.,* RFRA, the McCarran-Ferguson Act, the plain meaning of the PPACA phrase "preventive care" – but also to the presumption against preemption and the First Amendment.

PPACA provides no intelligible principle in 42 U.S.C. §300gg-13(a)(4) to guide the Administration's expansion from "preventive care and screening" to contraceptives and abortifacients, all without any congressional findings under the General Welfare Clause. *See* Section II.A, *supra.* The Constitution

does not allow Congress to write the Administration a blank check to circumvent state authority.

C. This Court Should Not Read PPACA to Preempt State Law, Which Requires this Court to Reject the Mandate

As explained in Section II.C.2, *infra*, the fields of insurance generally, preventive-care coverage specifically, and conscience exceptions all are fields that the states occupied before PPACA's and the Administration's intrusions. In essence, then, the Administration takes the position that its Contraceptive Mandate preempts state law. But federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Accordingly, under this Court's preemption analysis, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Santa Fe Elevator*, 331 U.S. at 230.

When this presumption applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. Significantly, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption

clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). As explained in the following sections, the presumption against preemption applies here and requires this Court to reject the Administration's expansive interpretation of the statutory phrase "preventive care" in health insurance.

1. The McCarran-Ferguson Act Requires this Court to Reject the Mandate as Preempting State Law

The McCarran-Ferguson Act requires a special deference to state law in regulating the business of insurance from both dormant federal power and laws enacted by Congress:

> Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating ... the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, *whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.*

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946) (emphasis added); *accord Fabe*, 508 U.S. at 500; *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003). Here, nothing in PPACA suggests that the Administration has the authority to override state insurance law for contraceptives and abortifacients.

If these coverage questions relate to the business of insurance, PPACA would need to authorize the Administration's actions via a statutory command. The phrase "business of insurance" obviously includes the coverage questions at issue here:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder.

SEC v. Nat'l Securities, Inc., 393 U.S. 453, 460 (1969); *accord Fabe*, 508 U.S. at 501. While the phrase "business of insurance" clearly includes the Contraceptive Mandate's requirements, it is less clear that PPACA itself, as interpreted by *NFIB*, qualifies as an "Act [that] specifically relates to the business of insurance." 15 U.S.C. §1012(b).

Certainly as applied to those in the individual market, PPACA is merely an elaborate tax exemption, not a regulation of the business of insurance:

> imposition of [§5000A's] tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice. ... Those subject to the individual mandate may

> lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

NFIB, 132 S. Ct. at 2600 & n.11. Under the McCarran-Ferguson Act, therefore, as applied to those in the individual market, the strong inference is that PPACA's minimum essential coverage provisions cannot override state insurance law simply by administrative fiat.

2. PPACA Intrudes into State-Occupied Fields

Although the federal government has been in the field of medical insurance under the Spending Clause for federal insurance programs paid for by the United States, PPACA represents a further federal expansion into several fields and sub-fields already occupied by the states, particularly private health insurance *not* funded under the Spending Clause. First, of course, the states long have regulated health insurance generally. *See Travelers Ins.*, 514 U.S. at 654. Second, as part of that regulation, states have regulated the types of mandatory preventive care that insurance policies in that state must cover and the terms on which they must cover them.[7] Third, as part of both forms of

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[7] *See, e.g.*, ALA. CODE §16-25A-1(8)(iv); ARK. CODE. ANN. §23-79-141; COLO. REV. STAT. §10-16-104(18); IND. CODE §27-8-24.2-10; KY. REV. STAT. §205.6485; MASS. GEN. LAWS ch. 175 §47C; MICH. COMP. LAWS ANN. §500.3501(b)(ix); MICH. ADMIN. CODE r.

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regulation, states have regulated the extent to which conscience rights apply to health insurance with respect to abortion and contraception.[8] Taken together, PPACA and the Contraceptive Mandate clearly intrude into fields that the states historically have occupied.

3. Congress Would Not Cavalierly Preempt State Law

As explained, even with obviously preemptive statutes, the presumption against preemption applies to limit the scope of that preemption. *Medtronic*, 518 U.S. at 485. Courts "rely on the presumption because respect for the States as

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325.6125(d)(ii); MINN. STAT. §§62J.01, 62J.04(3)(7), 62A.047, 62D.095(5); OKLA. STAT. tit. 36, §6907(B); *id.* tit. 63, §1-502; 72 PA. CONS. STAT. §3402b.5; W. VA. CODE §16-2J-1.

[8] *See, e.g.*, ARIZ. REV. STAT. §20-826(Z); ARK. CODE ANN. §20-16-304; CAL. HEALTH & SAFETY CODE §1367.25; CAL. INS. CODE §10123.196; COLO. REV. STAT. §25-6-102; CONN. GEN. STAT. §§38a-503e(b)(1), 38a-530e(b)(1); FLA. STAT. ANN. §381.0051; HAW. REV. STAT. §431:10A-116.7; LA. REV. STAT. §40:1299.31; 24 ME. REV. STAT. §2332-J; NEB. REV. STAT. §28-338; N.J. STAT. ANN. §17:48-6ee; N.Y. INS. LAW §§3221(l)(8), 4303(j); N.C. GEN. STAT. §58-3-178; TENN. CODE ANN. §68-34-104; *cf.* COLO. REV. STAT. §25-6-101 (public employees); W. VA. CODE §16-2B-4 (same); *see also* Erica S. Mellick, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL'Y 402, 419, 429-30 (2006). Although the foregoing authorities predate PPACA, states have continued to add to their regulations in these fields. *See, e.g.*, 2012 Ariz. Legis. Serv. 337 (West); 2012 Kan. Sess. Laws 112, §1, ch. 337, §1; 2012 Mo. Laws 749, §A.

independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* For example, *Santa Fe Elevator*, 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.* Notwithstanding the literal application of the federal statute, the presumption prevented the federal law's overstepping traditional state regulation in the absence of something much more explicit from Congress.[9]

As explained in the previous section, the states were heavily involved in all relevant aspects of insurance generally, preventive care, and conscience rights. As such, in order to avoid preempting state laws where Congress did not provide clear and manifest evidence of its intent to preempt these state

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[9] The presumption against preemption is not limited to states with relevant laws displaced by the federal law in question. Plaintiffs in states without such laws could point to state occupation of the field, in other states, to argue for interpreting federal law narrowly in their states.

laws, this Court must interpret the statutory phrase "preventive care" narrowly in order to avoid impinging on state-protected rights of conscience as well as discretion on what preventive care to cover. Where this Court can use a narrow interpretation to avoid preemption, *Altria Group*, 555 U.S. at 77, this Court should do so.

4. The Presumption against Preemption Answers the Scope of HHS Authority at *Chevron* Step One

At "*Chevron* step one," courts employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Only if the attempt to interpret the statute is inconclusive does a federal court go to "*Chevron* step two," where a court would defer to a plausible agency interpretation of an ambiguous statute. *Id.* at 844. Where (as here) the presumption against preemption applies, *Chevron* deference would be inappropriate.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed in pertinent part by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). The Courts of Appeals have adopted a similar approach against finding preemption under these circumstances.[10] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand here than Congress itself.

The presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns, *Santa Fe Elevator*, 331 U.S. at 230, and to interpret the statute that Congress wrote, *CSX Transp.*, 507 U.S. at 664, with its presumptively controlling ordinary meaning. *Morales*, 504 U.S. at 383. In essence the presumption against preemption is the tool of statutory construction that enables this Court to answer the statutory question at *Chevron*

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[10] *See Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review ... under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999); *see also Albany Eng'g Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996).

step one, *Chevron* 467 U.S. at 843 n.9, without resort to the Administration's interpretive gloss.

D. Abortion and Contraception Are Not "Preventive Care"

The foregoing backdrop provides several criteria with which to evaluate the scope of the Administration's authority to impose its Contraceptive Mandate under PPACA's requirement for "preventive care." Because the states already occupied the fields of insurance coverage for preventive care and conscience protections, *see* Section II.C.2, *supra,* the presumption against preemption applies here to the extent that the Administration attempts to displace either body of state law with uniform federal rules. *See* Section II.C.3, *supra.* Similarly, the McCarran-Ferguson Act further emphasizes that this Court should not interpret "preventive care" to encompass the Contraceptive Mandate. *See* Section II.C.1, *supra.* These traditional tools of statutory construction allows this Court to interpret PPACA without resort to the Administration's interpretations. *See* Section II.C.4, *supra.* Moreover, even recognizing that PPACA preempted *some* state law, the presumption against preemption applies to limit the *scope* of that federal preemption. *Medtronic,* 518 U.S. at 485. PPACA's failings under the General Welfare Clause and the non-delegation doctrine (Sections II.A-II.B, *supra*) simply amplify the Contraceptive Mandate's lawlessness.

Taking all these interpretive strands together, this Court can take one or both of the two paths: interpret "preventive care" narrowly or interpret

PPACA to include conscience protections. Under either path, Plaintiffs will prevail. Moreover, as indicated, the Court can take *both* paths. What these tools of statutory construction prohibit, however, is the Administration's attempt to avoid both paths.[11]

1. This Court Should Adopt a Narrowing Construction of PPACA that Excludes Prevention of Pregnancy from the Scope of "Preventive Care"

In order to avoid displacing state regulation of preventive care to the fullest extent possible, this Court should interpret the statutory phrase "preventive care" to connote the prevention of *disease,* which would minimize the Contraceptive Mandate's impact on pre-existing state laws on preventive care that are less expansive and less coercive than the Contraceptive Mandate. Viewed in

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[11] On a related note, the "cost-free" argument – namely, that the Mandate does not burden religious employers because they need not pay anything for "free coverage" under the Mandate, given that insurers save money because abortion and birth control cost less than childbirth – is pernicious and likely wrong. At the very least, this macabre insurance-pool analysis fails to consider the offsetting long-term benefits that children provide. In any event, forcing someone to procure insurance that violates that person's conscience would violate religious freedom, even if the added *financial* cost were free. The point is that facilitating sinful action – for example, providing insurance coverage used to cause abortions – is morally wrong to Plaintiffs, *see* authorities quoted at p.7, *supra,* which represents the *moral* cost imposed on religious employers.

this light, preventing pregnancies would fall outside PPACA's scope because *pregnancy is not a disease.*

This Court has at least implicitly recognized that pregnancy is not a disease. *Nashville Gas Co. v. Satty,* 434 U.S. 136, 140 (1977) (upholding decision not to treat pregnancy as a disease). Medical advisers at the Food & Drug Administration – the relevant agency within HHS – have recognized as much:

> The oral contraceptives present society with problems unique in the history of human therapeutics. Never will so many people have taken such potent drugs voluntarily over such a protracted period *for an objective other than for control of disease.*

U.S. Food & Drug Admin., Advisory Committee on Obstetrics and Gynecology, Report on the Oral Contraceptives 1 (1966) (emphasis added). Although the Eighth Circuit recently "decline[d] to address whether pregnancy is a 'disease,'" *Union Pacific,* 479 F.3d at 944-45, the Administration's Contraceptive Mandate now forces federal courts to answer that question. In doing so, this Court should reject the Administration's brave new world.

2. <u>This Court Should Adopt a Narrowing Construction of PPACA that Subjects "Preventive Care" to a Conscience Exception</u>

In order to avoid displacing state conscience protections to the fullest extent possible, this Court should interpret PPACA to include the fullest conscience protections allowed under state law. *Medtronic,* 518 U.S. at 485. Because such an

interpretation would provide a basis for reading PPACA not to preempt state conscience protections, this Court should adopt that interpretation over the Administration's interpretation. *Altria Group,* 555 U.S. at 77. This path would minimize or even eliminate PPACA's impacts on pre-existing state laws that protect rights of conscience and freedom of religion.

III. THESE ACTIONS ARE JUSTICIABLE

With the two limited exceptions outlined here, *amicus* Eagle Forum will defer to Plaintiffs to defend the justiciability of their claims. The following two sections explain why *all Plaintiffs* have standing to challenge the Contraceptive Mandate, and why the Administration's purported deferral of the Employer Mandate has no impact here.

A. The Plaintiffs Have Standing

The Administration challenges the standing of the individual Plaintiffs to suffer injury from actions that the Contraceptive Mandate compels the corporate Plaintiffs to take. While *amicus* Eagle Forum agrees with Plaintiffs' arguments on their standing to challenge the Contraceptive Mandate on religious-freedom grounds, it may not be necessary to resolve those issues for this Court to meet the Article III threshold to review this litigation. Both sets of Plaintiffs – *i.e.,* the individual and the corporate Plaintiffs – have standing, even without resort to the corporate-law divisions between them.

First, under *Natural Res. Def. Council v. SEC,* 606 F.2d 1031 (D.C. Cir. 1979) ("*NRDC v. SEC*"), the individuals have standing in their capacity *as shareholders* of the corporate Plaintiffs to bring this

action. *NRDC v. SEC* recognizes shareholders' standing to challenge government action impacting their ability to exercise their corporate-governance roles to ensure that the corporation operates in an ethically sound manner:

> All but one appellee have alleged that either they or their members own corporate shares that *they would like to vote in a financially prudent and ethically sound manner.* This allegation was sufficient to establish their standing to bring suit. Their interest was judicially cognizable, personal to them, and was arguably impaired by the lack of equal employment or environmental information. ... Moreover, we have no doubt that these appellees, as corporate shareholders concerned about environmental quality, are within the broad zones of interest of both NEPA and the securities acts.

Id. at 1042 (footnotes omitted, emphasis added).[12] Under *NRDC v. SEC,* therefore, the division that the Administration attempts to drive between individual

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[12] *NRDC v. SEC* is not an informational-standing case. One appellee – the Center on Corporate Responsibility – did not own shares, and the Court expressly declined to reach whether that appellee's distinct standing argument could qualify as informational standing because it "involve[d] complex and difficult considerations," and because its standing was unnecessary, given that the share-owning appellees had standing for the reasons set out in the body of the *NRDC v. SEC* opinion (quoted *supra*). *Id.* at 1042 n.6.

shareholders and the corporations is overstated, particularly for close corporations.

Second, even assuming *arguendo* that they could not invoke the elevated scrutiny of RFRA or the First Amendment, the corporate Plaintiffs nonetheless would have standing to challenge the arbitrary and *ultra vires* Contraceptive Mandate that the Administration seeks to impose on them:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. *See Euclid v. Ambler Realty Co.*; *Nectow v. City of Cambridge*; *Village of Belle Terre v. Boraas*. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth v. Seldin*.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted). As explained in Section II, *supra*, the Contraceptive Mandate is *ultra vires* as applied to *any* employer (*i.e.*, not merely to religious employers). As such,

unlike in *Arlington Heights*, the plaintiffs here do not need elevated scrutiny to prevail.

B. The Administration's Purported Delay of Employers' Obligation to Provide Insurance Has No Effect

The Administration's purported deferral of the Employer Mandate for 2014 has no impact on the justiciability of this litigation. Indeed, that deferral is *ultra vires* the Administration's authority and thus has no lawful impact whatsoever.

By way of background, "[a]ny assessable payment provided by this section shall be paid *upon notice and demand by the Secretary*, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. §4980H(d)(1) (emphasis added). Under the cited tax-penalty provisions, "[n]o penalty shall be imposed ... unless the Secretary notifies the taxpayer in writing ... that the taxpayer shall be subject to an assessment of such penalty." 26 U.S.C. §6672(b)(1). But PPACA cabins executive authority to waive penalties by allowing that the government "*may* provide for the payment of any assessable payment provided by this section on an annual, monthly, or other *periodic* basis as the Secretary may prescribe." 26 U.S.C. §4980H(d)(2) (emphasis added). Permissively allowing periodic payments precludes across-the-board, outright waivers of penalties: Agencies "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001).

Unlike statutes amenable to *unreviewable enforcement discretion*, this section is mandatory, *see* 26 U.S.C. §4980H, making the deferral reviewable. *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007). If directly reviewed, the deferral surely would be voided because the Executive Branch cannot lawfully amend statutes by fiat. *INS v. Chadha*, 462 U.S. 919, 956-58 (1983). As such, the current Administration's neglecting its obligation to faithfully execute the laws cannot estop the Administration – much less any *future Administrations* – from collecting the mandated penalties for 2014:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

F.C.I.C. v. Merrill, 332 U.S. 380, 384 (1947). Accordingly, the claimed deferral of the Employer Mandate has no bearing on the justiciability of this litigation.

CONCLUSION

For the foregoing reasons and those argued by Plaintiffs, this Court should hold that PPACA's mandates are unenforceable against not only for-profit corporations but also anyone else.

Dated: January 28, 2014 Respectfully submitted,

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